MOHAMAD RADZI ABU BAKAR

v.

PP

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
KC VOHRAH JCA
FAIZA TAMBY CHIK J
[CRIMINAL APPEAL NO: R-05-3-94]
25 JUNE 2002

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking cannabis - Conviction - Validity of conviction - Trial judge did not record finding on prosecution case in notes of proceedings before calling on defence - Whether a misdirection in law - Trial judge relied on presumption of possession and knowledge under s. 37(d) to invoke presumption of trafficking under s. 37(da) thereof - Whether an error in law - Whether appeal against conviction should be allowed - Muhammed Hassan v. PP - Arulpragasan Sandaraju v. PP - Criminal Procedure Code, s. 180*

CRIMINAL PROCEDURE: *Trial - Close of prosecution case - Whether trial judge is required to record a finding on the prosecution case in notes of proceedings before calling on defence - Muhammed Hassan v. PP - Arulpragasan Sandaraju v. PP - Criminal Procedure Code, s. 180*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(da) - Presumption of trafficking - Whether presumption can be invoked upon presumption of possession and knowledge under s. 37(d)*

EVIDENCE: *Presumption - Presumption of trafficking - Section 37(da) Dangerous Drugs Act 1952 - Whether presumption can be invoked upon presumption of possession and knowledge under s. 37(d)*

The appellant was sentenced to death in the High Court for trafficking 342.1 grams of cannabis, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and punishable under s. 39B(2) of the same. The appellant appealed before this court against the conviction on the grounds that: (1) the trial judge failed to record in his notes of proceedings the reasons for calling upon the defence; and (2) the trial judge erroneously invoked the presumption of trafficking under s. 37(da) DDA relying on a presumption of possession and knowledge of the drug under s. 37(d) of the same.

Held:
Per Mokhtar Sidin JCA (majority)

[1] The trial judge, in concluding that the appellant was in possession of the drug was relying on the presumption under s. 37(d) DDA. In finding that the appellant was trafficking in drug, the trial judge invoked the presumption under s. 37(da) since the weight of the drug found in possession of the appellant was more than 200 grams. Therefore, in coming to a conclusion that the appellant was guilty of an offence under s. 39(B), the trial judge applied the double presumptions which was not permitted by *Muhammed Hassan v. PP*. (p 801 f-g)

[2] The trial judge did not make any finding except to call for the defence at the end of the prosecution case. As the trial took place before the amendment to s. 180 of the Criminal Procedure Code ('CPC'), the decision of the Federal Court in *Arulpragasan Sandaraju v. PP* applied. That case requires a judge to make a finding at the close of the prosecution case on whether he is satisfied that the prosecution has proved its case beyond reasonable doubt. When the trial judge failed to express that finding at the close of the prosecution case, there was a misdirection in law. The appellant was entitled to know why he was called upon to enter his defence, failing which, it led to a miscarriage of justice. (pp 801 h & 803 e-f)

[3] As the appellant was in possession of the drug, the charge against him should be amended to one under s. 6, punishable under s. 39A(2) DDA since the weight of the cannabis found was more than 56 grams. (pp 803 h-i & 804 a)

Per KC Vohrah JCA (dissenting)

[1] There was clearly no duty on the part of the trial judge to record his reason in his notes of proceedings before he called upon the appellant to make his defence on the charge. He did give his reasons, however, in his grounds of judgment and it was open for review in this court whether he was correct in law on the evidence and law before him for calling on the appellant to make his defence. (p 808 a)

[2] The case in this appeal was not complicated and the facts establishing a *prima facie* case were obvious. The trial judge had relied on s. 37(d) DDA from the fact of custody and control of the four packages of cannabis found on the appellant to presume possession of and knowledge of the cannabis. In actual fact there was no necessity for him to have relied on the presumption as the evidence was overwhelming that the appellant was in possession of the cannabis and also knew that the drug was cannabis.

Therefore, at the close of the prosecution case there was sufficient positive evidentiary basis that the appellant had actual possession and knowledge of the cannabis and there was no necessity to merely presume that he had possession and knowledge thereof. (p 808 c, h)

[3] Having been in possession of the cannabis and being aware of its nature, there was also positive evidence that the appellant was within "trafficking" as defined in s. 2 DDA. There was no evidence to show otherwise than that he was carrying and transporting the said drug. Therefore, there was strong *prima facie* evidence of trafficking. When the trial judge called upon the appellant to make his defence on the charge of trafficking, there was ample positive evidence for him to do so although he had invoked s. 37(da) DDA to presume that the appellant was trafficking in the drug. (p 809 a-e)

[4] As the appellant caused the cautioned statement to be admitted and to be used for his defence, it was clear that the appellant had given the cautioned statement voluntarily to the recording officer. The defence contention that the cautioned statement was inadmissible could not stand. (p 810 a-c)

[5] The defence of duress could not succeed as there was absolutely no evidence of the nature of the duress let alone that the duress was imminent, extreme or persistent and that there was reasonable apprehension on the part of the appellant of instant death. (p 811 a-b)

[6] Even if the reliance on the presumption by the trial judge was a misdirection in law and might be a point in favour of the appellant, there was no miscarriage of justice. The appeal should be dismissed and the conviction and sentence imposed on the appellant affirmed. (p 812 d-e)

Per Faiza Tamby Chik J (majority)

[1] It was clear from the notes of proceedings that the trial judge did not record his finding at the close of the prosecution case. This was a fatal error for without making any finding thereof, the trial judge contravened s. 180 CPC. A trial judge must comply with s. 180 by giving a maximum evaluation of the prosecution witnesses at the close of the prosecution case by recording in his notes of proceedings that he is satisfied that the prosecution case succeeded in establishing a *prima facie* case against the accused and accordingly call the accused to defend himself. Without stating so in the notes of proceedings, the finding of the trial judge on the prosecution evidence would not be known at the close of the prosecution case as required under s. 180 CPC. The fact that the trial judge had stated it in his grounds of judgment was immaterial as it should have been done so at the close of the prosecution case. As the trial judge did

not make a positive finding in relation to the possession of the drug, the presumption under s. 37(da) DDA could not arise. The appeal should therefore be allowed and the appellant convicted under s. 6 punishable under s. 39A(2) DDA with 18 years' imprisonment from the date of arrest and 10 strokes of whipping. (pp 814 e-g, 815 g-i, 816 a-d & 817 c-d)

[Appeal allowed by a majority; conviction on an amended charge under s. 6 DDA punishable under s. 39A(2) of same; 18 years' imprisonment & 10 strokes of whipping.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu telah dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar cannabis sebanyak 342.1 gram, satu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') dan hukumannya di bawah s. 39B(2) Akta yang sama. Perayu merayu di mahkamah ini terhadap sabitan atas alasan-alasan berikut: (1) hakim perbicaraan gagal merekodkan di dalam nota prosiding sebab-sebab pembelaan dipanggil; dan (2) hakim perbicaraan tersilap memakai anggapan mengedar di bawah s. 37(da) ADB dengan bergantung kepada andaian pemilikan dan pengetahuan dadah tersebut di bawah s. 37(d) Akta yang sama.

Diputuskan:
Oleh Mokhtar Sidin HMR (majoriti)

[1] Hakim perbicaraan, di dalam kesimpulan bahawa perayu memiliki dadah tersebut telah bergantung kepada anggapan di bawah s. 37(da) ADB. Di dalam mendapati perayu terlibat mengedar dadah, hakim perbicaraan memakai anggapan di bawah s. 37(da) memandangkan berat dadah di dalam pemilikan perayu lebih daripada 200 gram. Oleh itu, di dalam kesimpulannya bahawa perayu bersalah di bawah s. 39(B), hakim perbicaraan menggunakan anggapan yang berganda yang tidak dibenarkan oleh *Muhammed Hassan v. PP*.

[2] Hakim perbicaraan tidak membuat apa-apa kesimpulan kecuali memanggil pembelaan pada akhir kes pendakwaan. Oleh kerana perbicaraan bermula sebelum pindaan kepada s. 180 Kanun Acara Jenayah ('KAJ'), keputusan Mahkamah Persekutuan di dalam *Arulpragasan Sandaraju v. PP* adalah terpakai. Kes tersebut memerlukan seorang hakim untuk memberi pendapatnya pada penutup kes pendakwaan sama ada beliau berpuashati bahawa pihak pendakwa telah membuktikan kesnya tanpa sebarang keraguan munasabah. Apabila hakim perbicaraan gagal untuk berbuat demikian, ia menjadi satu salah arah undang-undang. Perayu berhak untuk tahu sebab mengapa beliau dipanggil untuk membela diri dan kegagalan berbuat demikian membawa kepada salah laksana keadilan.

[3] Memandangkan perayu memilik dadah tersebut, pertuduhan ke atasnya sepatutnya dipinda kepada s. 6, penghukuman di bawah s. 39A(2) ADB kerana berat ganja yang dijumpai lebih daripada 56 gram.

Oleh KC Vohrah JCA (menentang)

[1] Tiada beban yang jelas ke atas hakim perbicaraan untuk merekodkan alasannya di dalam nota prosiding sebelum memanggil perayu untuk membuat pembelaan terhadap tuduhan. Bagaimanapun, beliau telah memberikan alasannya di dalam alasan penghakiman dan ianya terbuka untuk kajian di dalam mahkamah ini sama ada beliau betul dari segi undang-undang ke atas keterangan dan undang-undang di hadapan beliau apabila memanggil perayu untuk membuat pembelaan.

[2] Kes di dalam rayuan ini bukanlah sesuatu yang rumit dan fakta-fakta yang mengasaskan kes *prima facie* adalah jelas. Hakim perbicaraan telah bergantung kepada s. 37(d) ADB berkaitan fakta pemilikan dan penguasaan empat paket cannabis yang dijumpai atas perayu untuk menganggapkan pemilikan dan pengetahuan cannabis tersebut. Pada dasarnya tiada keperluan untuk beliau bergantung kepada anggapan tersebut kerana bukti-bukti adalah melebihi bahawa perayu memiliki cannabis tersebut dan beliau tahu dadah tersebut adalah cannabis. Oleh itu, pada penutup kes pendakwaan terdapat asas-asas pembuktian positif yang mencukupi bahawa perayu pada hakikatnya mempunyai pemilikan dan pengetahuan cannabis tersebut dan tiada keperluan untuk semata-mata menganggapkan bahawa beliau mempunyai pemilikan dan pengetahuan tersebut.

[3] Terdapat juga bukti positif bahawa perayu di dalam "pengedaran" seperti yang diterangkan di dalam s. 2 ADB memandangkan perayu memiliki cannabis tersebut serta tahu kandungannya. Tiada bukti menunjukkan sebaliknya melainkan beliau memiliki dan membawa dadah tersebut. Oleh itu, terdapat bukti-bukti *prima facie* pengedaran yang kuat. Apabila hakim perbicaraan memanggil perayu untuk membuat pembelaan ke atas tuduhan mengedar, terdapat bukti positif yang cukup untuk beliau berbuat demikian biarpun beliau memakai s. 37(da) ADB untuk menganggapkan bahawa perayu mengedar dadah tersebut.

[4] Memandangkan perayu menyebabkan pernyataan beramaran untuk dimasukkan dan digunakan untuk pembelaan, adalah jelas perayu telah memberikan pernyataan beramaran tersebut secara sukarela kepada pegawai yang merekodkannya. Hujah pembelaan bahawa pernyataan beramaran tersebut tidak terpakai tidak berasas.

[5] Pembelaan dures tidak boleh berjaya memandangkan tiada langsung bukti dures apatah lagi dures tersebut jelas, ekstrim atau berterusan dan terdapat kebimbangan yang munasabah perayu akan kematian serta merta.

[6] Sekiranya pergantungan ke atas anggapan oleh hakim perbicaraan satu salah arah undang-undang dan mungkin menjadi alasan yang memihak kepada perayu, tiada terdapat salah laksana keadilan. Rayuan sepatutnya ditolak dan sabitan serta hukuman ke atas perayu disahkan.

Oleh Faiza Tamby Chik H (majoriti)

[1] Adalah jelas daripada nota prosiding hakim perbicaraan tidak merekodkan pendapatnya pada penutup kes pendakwaan. Ini adalah satu kesilapan besar kerana ketiadaan pendapat tersebut, hakim bijaksana telah melanggar s. 180 KAJ. Seorang hakim perbicaraan mesti menuruti s. 180 dengan memberikan penilaian maksimum saksi-saksi pendakwaan pada penutup kes pendakwaan dengan merekodkan di dalam nota prosidingnya bahawa beliau berpuashati yang kes pendakwaan telah berjaya menimbulkan kes *prima facie* terhadap tertuduh dan seterusnya memanggil tertuduh untuk membela diri. Tanpa menyatakannya di dalam nota prosiding, pendapat hakim perbicaraan atas keterangan pendakwaan tidak akan diketahui pada penutup kes pendakwaan sebagaimana diperlukan di bawah s. 180 KAJ. Fakta bahawa hakim perbicaraan telah menyatakannya di dalam alasan penghakimannya tidak penting kerana ianya perlu dilakukan pada penutup kes pendakwaan. Oleh kerana hakim perbicaraan tidak membuat kesimpulan positif berkenaan pemilikan dadah tersebut, anggapan di bawah s. 37(da) ADB tidak timbul. Rayuan sepatutnya dibenarkan dan perayu disabitkan di bawah s. 6 hukumannya di bawah s. 39A(2) ADB dengan penjara 18 tahun dari tarikh tangkapan dan sepuluh kali sebatan.

[Rayuan dibenarkan oleh majoriti; sabitan atas pertuduhan pinda di bawah s. 6 ADB, hukuman di bawah s. 39A(2) Akta yang sama; 18 tahun penjara dan sepuluh kali sebatan.]

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Chan Khen Nam lwn. PP [2002] 1 CLJ 553 ***(refd)***
Chu Tak Fai v. PP [1998] 4 CLJ 789 ***(refd)***
Derrick Gregory v. PP [1988] 2 MLJ 369 ***(refd)***
Haryadi Dadeh v. PP [2000] 3 CLJ 553 ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 ***(refd)***
Khoo Hi Chiang v. PP And Another Appeal [1994] 2 CLJ 151 ***(refd)***
Leong Bon Huat v. PP [1987] 1 MLJ 492 ***(refd)***
Mohamed Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 ***(refd)***

Mohamed Yusof Hj Ahmad v. PP [1983] 2 MLJ 167 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(refd)***
PP v. Yuvaray [1969] 2 MLJ 91 ***(refd)***
Tan Seng Ann v. PP [1949] MLJ 87 ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 ***(refd)***
Yap Chai Chai & Anor v. PP [1973] 1 MLJ 219 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60
Criminal Procedure Code, ss. 173(f), 180
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A(2), 39B(1)(a), (2)
Internal Security Act 1960, s. 57(1)(a)

For the appellant - K Kumaraendran; M/s Kumar & Co
For the respondent - Nurulhuda Nur'aini Mohamad Nor DPP; AG's Chambers

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

I have the opportunity of reading the judgments in draft of my learned brothers, KC Vohrah JCA and Faiza Tamby Chik J which gave two conflicting decisions. After perusing the record of appeal and hearing the submissions of the learned counsel for the appellant and the learned Public Prosecutor, it is clear to me that the learned trial judge in his judgment applied the presumption under s. 37(d) of the Dangerous Drugs Act 1952 to come to the conclusion that the cannabis were found to be in the custody and under the control of the appellant, what is commonly called "in possession of the drug". From the record, the learned judge did not make specific finding that the drug was found in the possession of the appellant without invoking the presumption under s. 37(d) of the Dangerous Drugs Act. As can be seen from the evidence the drug were in newspaper wrappings in the pockets of the jacket worn by the appellant which was said to be given to him by a person in the Siamese town of Padang Besar. From this evidence one could only infer that the appellant is presumed to know that the newspaper wrappings contained the drug (cannabis). There is no evidence to show that the appellant was the one to put the drug in the newspaper wrappings and in the pockets of the jacket. Since the weight of the drug found was more than 200 grams, the learned judge invoked the presumption under s. 37(da) of the Dangerous Drugs Act. In coming to that conclusion it is clear to me that the learned trial judge had applied the double presumptions under ss. 37(d) and 37(da). Mindful of the decision in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170, I am of the view that the learned trial judge had erred when he found the appellant guilty of an offence under s. 39B of the Dangerous Drugs Act. The Federal Court in *Muhammed bin Hassan v. PP* held:

To come to the presumptions of possession and knowledge under s. 37(d) of the Act, one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug whereas to arrive at the presumptions of 'trafficking' under s. 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which here is not. Therefore, to constitute 'possession' under s. 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s. 37(d) must bear the same meaning as the word 'found' in s. 37(da). Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s. 37(d).

Moreover, to read the presumption of possession provided in s. 37(d) into s. 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s. 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s. 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved in the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s. 37(d) of the Act to invoke the presumption of trafficking under s. 37(da) thereof.

Reading the judgment of the learned trial judge, it is obvious to me that the learned judge, in concluding that the appellant was in possession of the drug was relying on the presumption under s. 37(d) of the Dangerous Drugs Act. In finding that the appellant was trafficking in drug the learned judge invoked the presumption under s. 37(da) since the weight of the drug found in possession of the appellant was more than 200 grams. Thus, in coming to the conclusion that the appellant was guilty of an offence under s. 39B, the learned judge applied the double presumptions which is not permitted by *Muhammed bin Hassan v. PP*. To be fair to the learned judge when he made his decision in the present appeal, *Muhammed bin Hassan v. PP* had not been decided yet.

Another unsatisfactory aspect of the present appeal is the finding of the learned judge at the end of the case for the prosecution. The learned trial judge did not make any finding except to call for the defence. Bearing in mind that the trial took place before the amendment to s. 180 of the Criminal Procedure Code the decision of the Federal Court in *Arulpragasan a/l Sandaraju v. PP* [1996] 4 CLJ 597 applies. In that case the majority held:

> The prosecution had to prove every ingredient of a charge and at the end of the case for the prosecution, the court should then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call an accused to enter his defence. Under s. 180 of the Code, the prosecution was obliged to make out against an accused a case which if unrebutted would warrant his conviction before the accused could be called upon to enter on his defence. Since in order to convict the accused, if the case for the prosecution was not rebutted, the court must be satisfied of the guilt of the accused beyond all reasonable doubt, the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt. Therefore the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia was, having regard to the statutory formula in s. 180 of the Code, the usual criminal standard of proof, to wit, the beyond all reasonable doubt standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution. 'A more rigorous test of credibility' was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* standard of proof of a mere *prima facie* case which called for a minimal evaluation of the evidence tendered by the prosecution.

It was further held by the majority:

> Applying the 'beyond all reasonable doubt test' to the evidence adduced by the prosecution, at the close of its case, it would have been wholly unsafe to convict the appellant of a capital offence, assuming he had elected to remain silent and to call no evidence. The misdirection in law by the trial judge, in applying the wrong test when calling for the defence, might well have occasioned a miscarriage of justice, having regard to the unsatisfactory nature of the prosecution's evidence. *He should, therefore have ruled at the close of the case for the prosecution that the evidence tendered by the prosecution was not strong enough to establish the case against the appellant beyond all reasonable doubt, that the appellant thus had no case to answer, and acquitted and discharged him without calling for his defence.* (emphasis added).

The learned trial judge in that case made the ruling which was stated as follows (see p. 37):

> Upon the evidence aforesaid, the judge ruled 'that the prosecution had established a *prima facie* case in accordance with the principles enunciated in the cases of *Haw Tua Tau, Ragunathan and Munusamy*, and so there was a case to 'answer', thereby, overruling a submission of no case to answer by counsel for the appellant.

From the notes of proceedings as found in the record, the learned trial judge merely stated at the close of the prosecution the following:

Court: Defence dipanggil
Sambung bicara 4 Mac 1994 dan 25 Mac 1994.

Nowhere it is shown in the notes that the learned trial judge that after hearing and evaluating the evidence adduced by the prosecution that he was satisfied that the prosecution had made out a case of beyond reasonable doubt against the appellant. In fact there was no finding by the learned judge as to the prosecution's case. Admittedly, the learned judge in his written judgment did state the reasons why he called for the defence. I am of the view that the appellant is entitled to know whether at the close of the prosecution's case why his defence was called. My learned brother, KC Vohrah, JCA cited the case of *Yap Chai Chai & Anor v. PP* [1973] 1 MLJ 219 as the authority that there is no necessity for the learned trial judge to give his reasons for calling the defence. He also cited the case of *Junaidi bin Abdullah v. PP* [1993] 4 CLJ 201.

With the greatest respect to my learned brother, it is clear to me that the authorities cited by my learned brother were before the decision of the Federal Court in *Arulpragasan* where the scenario had changed resulting with the amendment to s. 180 of the CPC. Suffice to say that before the decision of *Arulpragasan* some courts accepted the lesser degree of burden of proof by the prosecution, ie, on the basis of *prima facie*. *Arulpragasan* imposed a higher degree of proof which was 'beyond reasonable doubt'. In my view, *Arulpragasan* requires a judge to make a finding at the close of the prosecution's case that he is satisfied that the prosecution has proved its case beyond reasonable doubt. In the present appeal, when the learned judge failed to express that finding at the close of the case for the prosecution, there is, in my view, a misdirection by the learned judge. The appellant is entitled to know why he was called upon to put up his defence. This, in my view, is a miscarriage of justice.

For the above reasons, I agree with my learned brother, Faiza Tamby Chik J, that the appeal should be allowed. By majority of two to one the appeal by the appellant is hereby allowed.

Even though the appeal is allowed, my learned brother, Faiza Tamby Chik J, and I are of the opinion that the appellant was deemed to be in possession of the drug. As such we agree with our learned brother, KC Vohrah JCA that the appellant was in possession of the drug.

We hereby amend the charge against the appellant to one under s. 6 and punishable under s. 39A(2) of the Dangerous Drugs Act since the weight of the cannabis found was more than 56 grams. We are unanimous in finding the appellant guilty of the offence and convict him under s. 6 and punishable

under s. 39A(2). We are also unanimous that the punishment to be imposed is eighteen (18) years' imprisonment from the date of arrest and ten (10) strokes of whipping.

KC Vohrah JCA:

The charge against the appellant (the accused) in the Kangar High Court was that he trafficked in 342.1 grammes of cannabis on 20 December 1991 at 3.30pm at the 12 milestone, Jalan Padang Besar, Kangar, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) punishable under s. 39B(2) of the Act.

The judge found him guilty and convicted him. He was sentenced to death.

The conviction is attacked before the court on two grounds:

1. that there is a requirement in law for a trial judge to record in his notes of proceedings the reasons for calling upon an accused to make his defence on a charge and that in this case the trial judge had failed to do so when he called the accused to make his defence on the charge;

2. that the judge as shown in his grounds of decision had erroneously invoked the presumption of trafficking in the dangerous drug under s. 37(1)(da)(vi) of the Act relying merely on a presumption of possession and knowledge of the said drug under s. 37(1)(d) of the Act when the Federal Court in *Muhammed bin Hassan* [1998] 2 CLJ 170 has ruled that the presumption of trafficking under s. 37(da) cannot be invoked upon the presumption of possession of a dangerous drug that arises under s. 37(d) through mere proof of custody and control of the container containing the dangerous drug.

The facts of the case need to be looked into to understand the case before the court.

On 20 December 1991 at about 3.30pm after superintendent of customs Mohd. Pudzi (PW2) and his men had taken up their respective positions in front of Taman Imigresyen, Padang Besar, Perlis, to intercept a motor cycle bearing registration number PBE 8922 he was informed that the said motor cycle with two persons on it was approaching the interception area travelling towards Kangar. Customs officer Shariffudin who was with PW2 went to the center of the road and held up a stop sign which read "Berhenti Kastam" ("stop custom"). The rider (who was the accused) of the motor cycle did not stop but instead made a turn and headed away in the opposite direction. At the same time the pillion rider of the motor cycle jumped from the motor cycle and ran away.

Both the rider and the pillion rider, Saiful, were eventually arrested.

The accused was wearing two jackets, a long-sleeved one over a short-sleeved jacket.

From the right inner pocket of the long-sleeved jacket a package wrapped in Thai newspaper was taken out and another similarly wrapped package was taken from the left inner pocket.

From the left and right pockets of the inner jacket that he wore were recovered similarly wrapped packages.

All four packages recovered from the two jackets contained dry plant material which the Government Chemist, PW1, analysed and found to be "cannabis" as defined under the Act.

"Cannabis" is defined in s. 2 and is a "dangerous drug" within the meaning of the latter expression defined in the same s. 2, being a drug comprised in the First Schedule to the Act.

According to the trial judge in his grounds of decision he was satisfied that the four packages that had been seized were under the custody and control of the accused and he invoked the presumption under s. 37(d) of the Act. He also stated that since the weight of the cannabis that was seized was more than 200 grams he was invoking the presumption under s. 37(da) of the Act.

In relation to s. 37(d) which the trial judge relied on what is provided is that "any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug".

As for s. 37(da) which the learned trial judge relied on the relevant provision reads "any person who is found in possession of ... (vi) 200 grammes or more in weight of cannabis ... otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug".

The trial judge stated in his decision that after considering all aspects of the prosecution case he was satisfied that the prosecution had proved its case beyond reasonable doubt, which if unrebutted would warrant his conviction and he called upon the accused to enter his defence.

It has been pointed out that in the notes of proceedings of the trial there is no record that the trial judge had written down his reasons for calling upon the accused to make his defence. However, the trial judge did advance in his grounds of decision the reason why he called upon the accused to enter his

defence. It is argued that there is not sufficient compliance with s. 180 of the Criminal Procedure Code (CPC). The provision, falling under Chapter XX of the CPC relating to trials before the High Court, as it stood in 1994 at the date of the trial (before its amendment in 1997, see A 979 of 1997), reads thus:

> 180. When the case for the prosecution is concluded the Court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if he does not so find, shall call upon the accused to enter on his defence.

It was further argued that the trial judge must write his reasons down in his notes of proceedings as that would show he had considered the case before he made up his mind to call upon the accused to enter his defence in addition to giving notice to the accused the reasons for his having to enter his defence.

This argument is not a new argument. It was canvassed before as can be seen in the Federal Court case of *Yap Chai Chai & Anor v. PP* [1973] 1 MLJ 219 and the Supreme Court case of *Junaidi bin Abdullah v. PP* [1993] 4 CLJ 201.

In *Junaidi* one of the complaints brought up in the appeal in the Supreme Court relating to the trial of Junaidi, where he was convicted for possession of a firearm under s. 57(1)(a) of the Internal Security Act 1960, was that the fact that before making the order calling for the defence neither in the notes of evidence nor in his grounds of judgment did the learned judge expressly record why he was satisfied that there was a *prima facie* case to answer, or why, in his opinion, the prosecution had established a *prima facie* case which, if unrebutted, would warrant a conviction.

In dealing with this complaint Mohamed Azmi SCJ, delivering the grounds of judgment of the Supreme Court, made reference to the case of *Yap Chai Chai*. In that appeal to the then Federal Court against conviction on a murder charge, it was argued that it was mandatory for the trial judge, at the close of the prosecution's case, to enter on the record, his opinion that there was a case to answer and that his failure to do so had rendered the trial a nullity. Mohamed Azmi SCJ then reproduced what was stated by HT Ong CJ in the case at p. 205:

> Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear *prima facie* case, and that the learned trial judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions s. 204(2) of the Criminal Procedure Code (SS Cap 21) had any application, nor do we agree with the contention of Datuk SP Seenivasagam that it was mandatory for the judge at the close of the prosecution to enter on the record

his opinion that there was a case to answer – the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgments delivered by Willan CJ in *Ng Peng Choon v. PP* [1947] MLJ 87 and *Govendasamy v. PP* [1949] MLJ 101. In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial – not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.

Mohamed Azmi SCJ then held that in the opinion of the Supreme Court, there is also no statutory provision requiring a judge sitting alone to expressly record his reason before calling the accused to enter his defence or to state his findings on the credibility of main prosecution witnesses. But, as a matter of practice, where there is a particular reason for doing so, such as where a submission to answer has been made in a complex case, or where the accused is called to enter a defence on a lesser or alternative charge, judges do sometimes give their reasons. In uncomplicated cases, such as in the appeal before the court, it was not obligatory or even necessary to do so.

The impeccable reasoning given by Mohamed Azmi SCJ why it is not necessary to record his reasons is manifest in this passage at p. 206:

By calling an accused to enter his defence, it should be assumed that the trial judge must on evaluation of the evidence, have been satisfied that the prosecution had, at that stage of the trial, established a *prima facie* case which, if unrebutted, would warrant a conviction of the accused. To arrive at such a conclusion, it is inherent that the judge must consider all the evidence adduced by the prosecution as tested in cross-examination, on a *prima facie* basis. In this appeal, the establishment of a *prima facie* case of unlawful possession of a firearm under s. 57 of the Act was so obvious, even to the defence counsel, that it became academic and unnecessary for the court to consider an order of acquittal under s. 180 of the Code. Thus, when the learned judge called for the defence in the present case, he must have been satisfied that there was a *prima facie* case to answer which, if unrebutted, would warrant a conviction, and it was not mandatory for him to record the reasons for his satisfaction, even if there had been no concession made by the defence counsel. However, whether the judge was actually correct in law in calling for the defence was of course open for review on appeal to this court. Be that as it may, we hold the view that mere failure or omission on the part of a trial judge to record his grounds for his findings on credibility of witnesses at that stage of the trial is not sufficient by itself for allowing an appeal, particularly when considered in the light of the provisions of ss. 60 and 72 of the Courts of Judicature Act 1964 read together with s. 167 of Evidence Act 1950 and s. 422 of the Code.

Reverting to the case before this court there is clearly no duty on the part of the trial judge to record his reason in his notes of proceedings before he called upon the accused to make his defence on the charge. He did give his reasons, however, in his grounds and it is open for review in this court whether he was correct in law on the evidence and law before him for calling on the accused to make his defence on the charge.

The case in this appeal is not complicated and the facts establishing a *prima facie* case are obvious. The learned judge had relied on s. 37(d) of the Act from the fact of custody and control of the four packages of cannabis to presume possession of and knowledge of the cannabis. In actual fact there was no necessity for him to have relied on the presumption as the evidence was overwhelming that he was in possession of the cannabis and that he knew that the drug was cannabis. The evidence showed that he was wearing not one but two jackets. The top long sleeved jacket had two bundles of the cannabis, P4 and P5, one in the right and the other in the left inner pockets of the jacket the gross weight being about 180 grammes (see the evidence of the Chemist, PW1, Record of Appeal, p. 6). Anyone wearing it would have felt the packages sticking against the chest and the jacket being weighed down by the two packages. Equally telling was the presence on his person of the inner short sleeved jacket which was weighed down by the two packages of cannabis, P6 and P7, one in the right and the other in the left pocket of the jacket, having a gross weight of 192 grammes (see evidence of PW1, Record of Appeal pp. 6 and 7). There cannot have been but a deliberate act on his part to have worn two jackets with packages and it would be an attack on commonsense to say that he did not know the packages were packages of cannabis. In any event from the nature of the cross-examination of the witnesses there was no question put to the prosecution witnesses to show that the accused was not aware that he was carrying the four packages or that he was not aware that he was carrying cannabis (see the notes in the Record of Appeal, pp. 22 to 27 relating to the cross-examination of PW2).

The other telling piece of evidence which has to be taken into account which shows that clearly that the accused was aware of the packages and was aware of its incriminatory nature was that when he was signalled to stop by a customs officer who held up a customs stop sign "Berhenti Kastam". Instead of stopping he turned around and headed in the opposite direction.

Thus at the close of the prosecution case there was sufficient positive evidentiary basis that the accused had actual possession and knowledge of the said cannabis and there was no necessity to merely presume that he had possession and knowledge thereof.

As for the trafficking, having been in possession of the cannabis and being aware of its nature there was also positive evidence that he fell within the meaning of "trafficking" as defined in s. 2 of the Act, which states:

> 2. In this Act, unless the context otherwise requires:
>
> ...
>
> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, **transporting, carrying,** sending, delivering, procuring, supplying, or distributing any dangerous drug. (emphasis added)

There was no evidence to show the context to be otherwise that he was carrying and transporting, all the while knowing what he was doing – knowingly carrying the drugs on his person and riding on a motor cycle with it from one place to another and knowing the nature of the drugs as being dangerous drugs, to wit cannabis. There was very strong *prima facie* evidence of trafficking in the dangerous drug.

Thus when the trial judge called upon the accused to make his defence on the charge of trafficking in the cannabis there was ample positive evidence for him to do so although he had invoked s. 37(1)(da) to presume that the accused was trafficking in the drug and the accused elected to make his defence on oath.

The learned trial judge first observed that the accused had informed the court that on the day of the incident he and one Saiful (DW2) had gone from Sintok, Kedah, to Pekan Siam, Thailand on a motor cycle and that while he was at a house in Pekan Siam, Thailand, a male Thai had given him four packages to be brought back to Sintok, Kedah.

Then the trial judge continued.

> Jawapan kepada soalan 15 dalam percakapan hemat (D20), tertuduh menyatakan bahawa, dia mengetahui barang itu barang ganja dari baunya.
>
> Semasa disoal balas oleh TPR, dia berkata benda yang dibawa itu salah, sebab itu dia lari.
>
> Dari fakta tersebut, adalah jelas tertuduh mengetahui tentang isi kandungan empat bungkusan yang dibawanya.
>
> In the answer to question 15 in the cautioned statement (D20), the accused stated that he knew that the goods were ganja from its smell. Under cross-examination by the DPP, he stated that the goods he carried were prohibited goods, and that was why he ran.
>
> From these facts it is clear that he knew what the contents of the four packages that he carried were.

Before I go further I need to deal with the defence contention that the cautioned statement (D20) is inadmissible as it had not been shown to have been voluntarily made. It has to be pointed that when the accused made his defence he was the one who introduced it (see p. 59 of the Appeal Record) when it was marked, for purposes of identification, 1D20. Superintendent of Customs, Govinder (PW3), who recorded the cautioned statement of the accused was recalled by the defence to identify 1D20 as the statement that he had recorded from the accused and it was then produced and marked defence exh. D20. It was the accused, who was represented by counsel, who caused D20 to be admitted and to be used for his defence and there can be no clearer statement that the trial court could get that the accused had given the cautioned statement voluntarily to the recording officer. The contention that the cautioned statement is inadmissible cannot therefore stand.

We now go back to the cautioned statement. What needs to be noted is that the High Court had on the basis of the admission made in the cautioned statement by the accused that he knew that the goods were ganja (cannabis) from the ganja's smell and the admission, under cross-examination by the DPP, that he knew the goods were prohibited goods and that was why he ran away, made a perfectly legitimate finding of fact that the accused knew what the contents of the four packages that he had carried were.

The trial judge then considered the defence of duress which the accused relied on. The accused told the court that he had gone to Pekan Siam, Thailand because he had been threatened by one Razali, his paternal uncle; Razali had threatened to kill him.

The trial judge rejected the defence of duress noting that the accused had not stated (during examination-in-chief) the manner and the place and when he was threatened. The trial judge also considered that the evidence of Saiful (DW2) did not support the claim by the accused that Saiful was with him when the threat was made.

The trial judge also made a finding the accused was not telling the truth after the learned judge pointed out that the oral evidence of the accused that the goods were handed over to him at a house contradicted what he stated in the cautioned statement that he handed the goods at a railway track.

The trial judge, following the case of *Derrick Gregory v. PP* [1988] 2 MLJ 369 stated that the facts adduced did not show duress. The learned judge also observed that there was altogether no evidence of threat on the accused by anyone with a pistol. The trial judge noted that the accused should have made a police report to the police and then should have aborted his trip to Padang Besar (assuming that there was a threat).

Counsel for the appellant in this court did not take issue with the rejection by the trial judge of the defence of duress and rightly so too as other case law including *Mohamed Yusof bin Haji Ahmad v. PP* [1983] 2 MLJ 167, *Tan Seng Ann v. PP* [1949] MLJ 87 and *Chu Tak Fai v. PP* [1998] 4 CLJ 789 show that the defence cannot succeed in view of the absence of evidence that even if the accused is to be believed that he brought the cannabis from Thailand to Malaysia under threat by Razali there was absolutely no evidence of the nature of the duress let alone that the duress was imminent, extreme or persistent and that there was reasonable apprehension on the part of the accused of instant death.

In convicting the accused on the trafficking charge the learned judge found:

Firstly, that on a balance of probabilities the accused had not rebutted the prosecution's case and cited *PP v. Yuvaray* [1969] 2 MLJ 91 as authority. It was quite obvious that the learned judge had found that the presumption of possession and knowledge under s. 37(d) and of trafficking under s. 37(da)(vi) had not been rebutted on a balance of probabilities.

Secondly, that the defence had failed to raise a reasonable doubt on the prosecution case on the guilt of the accused.

It will be noted that the trial judge decided this case in 1994 well before the Federal Court case of *Muhammad bin Hassan v. PP* [1998] 2 CLJ 170 on the matter of the presumptions. In any event there was indeed no necessity for him to have relied on them as there was ample evidence to show that at the close of the prosecution case that the accused had possession and knowledge of the ganja and that he was trafficking in the cannabis. The trial judge should not have relied on the presumptions as the burden of rebutting the presumption on a balance of probabilities on the accused is higher than the burden of casting a reasonable doubt on the prosecution case (see *Mohamed Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311).

However, in the context of this case, there was no denial by the accused that he carried the 342.1 grammes of cannabis in four packages in two jackets which he wore and that he tried to flee when the customs tried to stop his passage along the road on his motorcycle, that he knew the goods were "barang salah" (prohibited goods) that he carried, though he did not know what they actually were and that he was under duress to carry the goods from Thailand into Malaysia. The trial judge evaluated both the prosecution and defence evidence and dealt with the contested issue of whether the accused knew that the goods ("barang salah") were cannabis and in the light of the cautioned statement that he had made and which the accused and had himself

adduced in evidence where he acknowledged the goods were ganja (cannabis) through the smell and the trial judge's rejection of the defence of duress the trial judge was clearly right in concluding that the defence had not raised a reasonable doubt on the prosecution's case on the guilt of the accused on the charge of trafficking in cannabis.

Thus while the trial judge was wrong to rely on the presumptions there was ample evidence upon which he could and did call the accused to make his defence and in the light of the evidence of the accused his defence, on the totality of evidence adduced before the court, was rightly evaluated and considered independently of the presumptions and it was perfectly legitimate for the trial judge to make a finding that the defence had failed to raise a reasonable doubt in the prosecution case on the guilt of the accused.

Even if the reliance on the presumption by the trial judge is considered a misdirection in law and might be a point in favour of the accused there has been no miscarriage of justice and bearing in mind the proviso to s. 60 of the Courts of the Judicature Act 1964 and the Federal Court case of *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381 on the interpretation of the equipollent provision, s. 92(1), relating to the powers exercisable by the Federal Court on the termination of the hearing of an appeal, there has been no miscarriage of justice and the appeal herein is dismissed. I would affirm the conviction and sentence imposed on the accused.

Faiza Tamby Chik H:

Dalam rayuan ini kedua-dua pihak menumpukan hujah mereka kepada dua persoalan pokok yang berbangkit iaitu pertamanya hakim bicara menurut nota keterangan telah tidak mencatitkan dalam notanya sama ada beliau ada menimbangkan kes pendakwaan pada akhir kes pendakwaan iaitu sama ada terdapat satu kes *prima facie* melampaui keraguan yang munasabah menurut s. 180 Kanun Acara Jenayah iaitu prosidur setelah pihak pendakwaan menamatkan kesnya dan keduanya hakim bicara telah salah arah kerana memakai kedua-dua anggapan di bawah s. 37(d) dan (da) Akta Dadah Berbahaya 1952 (Akta tersebut).

Perayu telah dituduh mengedar dadah berbahaya iaitu cannabis seberat 342.1 gram di bawah s. 39B(1)(a) Akta tersebut dan didapati bersalah, disabitkan dan dijatuhkan hukuman mati mandatori menurut s. 39B(2) Akta yang sama. Perayu telah merayu ke mahkamah ini. Rayuan beliau telah didengar pada 18 Mac 2002 dan keputusannya telah ditangguhkan.

Fakta kes pendakwaan telah diringkaskan oleh hakim bicara seperti berikut:

Mengikut keterangan Penguasa Kastam Mohd. Fauzi bin Man (SP2), pada 20.12.91 jam lebihkurang 2.30 petang beliau dan anggota-anggotanya mengambil tempat masing-masing di hadapan Taman Imigresen Padang Besar, Perlis. Semasa berada di situ, SP2 menerima maklumat dari PIK Ab. Rahman melalui walkie talkie memberitahu bahawa beliau telah nampak motosikal yang disyaki No. PBE 8922. Motosikal tersebut berjalan menuju dari arah bandar Padang Besar ke Kangar. Semasa itu juga PIK Sharifuddin yang berada bersama SP2 masuk ke tengah jalan dan mengangkat papan tanda yang bertulis "Berhenti Kastam". Motosikal tersebut berhenti dan berpusing balik ke arah Padang Besar. Pada masa yang sama pembonceng melompat dari motosikal dan melarikan diri. Pada masa yang sama SP2 bertempik "Berhenti Kastam" serta melepaskan tembakan satu das ke udara.

Selepas kejar mengejar, anggota-anggota SP2 berjaya menangkap kedua penunggang dan pembonceng. Penunggang ialah tertuduh sementara pembonceng ialah seorang bernama Saiful (DW2).

Semasa di tempat kejadian SP2 telah memeriksa salah satu daripada jeket di badan tertuduh dan mendapati, dalam poket sebelah kanan, satu bungkusan akbar yang mengandungi daun-daun kering disyaki ganja.

Kemudian SP2 dan tertuduh beredar dari tempat kejadian ke pejabat SP2. Semasa dalam pejabat, SP2 memeriksa kedua jeket di badan tertuduh dan menjumpai tiga bungkusan lagi. SP2 menyimpan keempat bungkusan yang mengandungi daun-daun kering dalam peti besi yang berkunci di pejabatnya.

Pada 21.12.91 jam lebih kurang 2.45 petang, SP2 menyerah keempat bungkusan kepada Penguasa Kastam Ani b. Hussin (SP7) untuk disimpan.

Jumlah dadah yang dirampas ialah 342.1 gram. Daripada jumlah ini, PW1 telah mengambil 40 sampal seberat 55.4 gram untuk dianalisa. Berbanding dengan berat dadah yang dirampas, saya tidak bersetuju dengan perhujahan peguambela yang mengatakan amaun dadah yang dianalisa tidak memadai (lihat *Leong Bon Huat v. PR* [1993] 3 CLJ 603).

Hasil tiga ujian oleh SP1 ke atas sampal, beliau mendapati ada tanda-tanda positif sebagai menunjukkan bahan yang diperiksai itu adalah cannabis.

Dapat diperhatikan bahawa menurut intisari keterangan fakta di atas hakim bicara telah menyatakan bahawa "Di atas intisari keterangan-keterangan tersebut di atas, saya berpuashati bahawa keempat bungkusan yang dirampas berada di bawah jagaan atau kawalan tertuduh dan andaian di bawah s. 37(d) DDA 1952 terpakai. Memandangkan berat cannabis yang dirampas melebihi 200 gram, andaian di bawah s. 37(da) Akta yang sama juga terpakai. Setelah menimbang segala aspek kes ini, saya berpuashati bahawa kes pendakwaan telah terbukti dengan sepenuhnya tanpa keraguan munasabah dan, jika tidak disangkal, ia akan mengakibatkan kesalahan ke atas tertuduh. Tertuduh dipanggil untuk menjawab kes."

Dapat diperhatikan juga perkara di atas telah dicatitkan oleh hakim bicara dalam buku notanya seperti berikut:

20.1.94

Court: Defence dipanggil.

Sambung bicara 4 Mac 1994 dan 25 Mac 1994.

...

...

2.6.94

Pihak-pihak sama.

3 alternative dibaca kepada tertuduh.

DW1 (Tertuduh)

Mohamad Radzi bin Abu Bakar.

Bersumpah dan bercakap dalam bahasa Malaysia.

...

Adalah nyata daripada nota keterangan yang dibentangkan di atas bahawa hakim bicara telah tidak mencatitkan apa-apa pendapat langsung apabila kes bagi pendakwaan itu ditutup, tiada sebarang pertimbangan dibuat mengenai pertuduhan dan keterangan yang dibentangkan oleh pihak pendakwaan sama ada mencukupi untuk si perayu dipanggil membela diri. Apa yang dicatitkan di dalam buku nota hanya "defence dipanggil". Saya berpendapat ini adalah satu kesilapan yang membawa maut kepada kes ini kerana dengan tiada membuat sebarang penimbangan mengenai tuduhan dan keterangan pendakwaan setelah pihak pendakwaan menamatkan kesnya bermakna hakim bicara telah tidak mengeluarkan apa-apa pendapat atau penimbangan langsung mengenai kes pendakwaan. Kerananya hakim bicara telah melanggar prosidur s. 180 Kanun Acara Jenayah secara langsung. Seksyen 180 memperuntukkan:

> Apabila kes bagi pendakwaan itu ditutup, jika Mahkamah berpendapat tiada apa-apa kesalahan terhadap tertuduh itu dan tidak ada apa-apa keterangan yang dibuktikan ia disabit salah maka hendaklah ia merekod perintah pembebasan, atau jika tidak didapati sedemikian hendaklah memanggil tertuduh itu membuat pembelaan.

Ungkapan "atau jika tidak didapati sedemikian" (or, if it does not so find) membawa makna sekiranya hakim bicara berpendapat atau membuat pertimbangan bahawa si tertuduh telah melakukan apa-apa kesalahan dan ada beberapa keterangan yang dibuktikan yang boleh disabitkan oleh pihak

pendakwaan, maka hakim bicara hendaklah memanggil tertuduh itu membuat pembelaan. Perkara ini bukanlah boleh dicatitkan dalam nota keterangan semudah catitan "defence dipanggil". Setidak-tidaknya hakim bicara hendaklah menunjukkan dalam buku nota keterangannya bahawa beliau telah menimbangkan dan menilai segala keterangan yang dibentangkan oleh pihak pendakwaan yang telah diuji dalam suatu pemeriksaan balas.

Dalam kes Mahkamah Agong *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492 ms 498, Mohamed Azmi SCJ berkata, "The requirement of s. 180 or s. 173(f) CPC cannot be properly complied with unless the judge or magistrate considers or evaluates all the evidence adduced by the prosecution as tested in cross-examination".

Dalam kes Mahkamah Agong *Khoo Hi Chiang v. Public Prosecutor and Another Appeal* [1994] 2 CLJ 151 Edgar Joseph Jr. HMA berkata:

> (Oleh Edgar Joseph Jr HMA) Tugas mahkamah pada penutup kes pendakwa adalah untuk melakukan bukan hanya suatu penilaian minima terhadap keterangan yang dikemukakan oleh pihak pendakwa untuk menentukan sama ada keterangan pihak pendakwa itu sememangnya tidak boleh dipercayai, iaitu ujian *Haw Tua Tau*, tetapi suatu penilaian maksima keterangan itu untuk menentukan sama ada pihak pendakwa telah membuktikan tuduhan terhadap tertuduh sehingga melebihi keraguan yang munasabah.

Dalam kes Mahkamah Persekutuan *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597, mahkamah memutuskan (oleh Wan Adnan HMP), "Ini tidak bermakna bahawa mahkamah dalam memanggil tertuduh untuk memasukkan pembelaannya telah membuat suatu pendapat mengenai kesalahan tertuduh. Mahkamah hanya mendapati bahawa setiap ramuan kesalahan itu telah dibuktikan melampaui semua keraguan munasabah dan bahawa jika tiada sebarang keterangan pematahan, tertuduh itu akan disabitkan di atas keterangan yang dikemukakan oleh pihak pendakwa. (lihat ms 76B)."

Adalah jelas di sini menurut apa yang disebut oleh kedua-dua kes Mahkamah Agong di atas bahawa seseorang hakim bicara hendaklah mematuhi s. 180 Kanun Acara Jenayah dengan memberikan penilaian yang secukupnya pada kadar maksima kepada keterangan saksi-saksi pendakwa pada akhir kes pendakwa dengan mencatitkan dalam buku notanya bahawa hakim tersebut telah berpuashati bahawa pihak pendakwa telah berjaya membuktikan suatu kes *prima facie* terhadap tertuduh dan justeru itu memanggil tertuduh membela diri. Saya menyatakan "dengan menuliskannya dalam buku notanya" kerana tanpa berbuat demikian kita tidak dapat mengetahui pendapat hakim bicara mengenai penimbangan dan penilaian keterangan kes pendakwa apabila pihak pendakwa menamatkan kesnya oleh kerana s. 180 Kanun Acara Jenayah menghendaki hakim bicara memberikan pendapat atau ulasannya sedemikian. Dalam kes kita

hakim bicara hanya mencatitkan dalam buku notanya "defence dipanggil" tanpa memberikan pendapatnya mengenai keterangan pihak pendakwa. Saya berpendapat hakim bicara telah membuat satu kesilapan yang besar di sini yang membawa nahas kepada kes itu. Oleh kerana hakim bicara tidak memberikan sebarang pendapat atau penilaian pada peringkat kes *prima facie* itu dan ini adalah jelas sekali kerana tiada apa-apa catitan dibuat dalam buku notanya, maka hakim bicara telah melakukan satu kesilapan yang besar kerana tidak mematuhi s. 180 Kanun Acara Jenayah. Betul hakim bicara ada menyatakan dalam alasan penghakimannya bahawa "setelah menimbang segala aspek kes ini saya berpuashati bahawa kes pendakwa telah terbukti dengan sepenuhnya tanpa keraguan munasabah jika tidak disangkal ia akan mengakibatkan kesalahan ke atas tertuduh. Tertuduh dipanggil untuk menjawab kes". Saya berpendapat cara ini tidak betul. Sepatutnya hakim bicara menuliskan petikan di atas dalam buku notanya sebaik sahaja pihak pendakwa menamatkan kesnya seperti yang dikehendaki oleh s. 180 Kanun Acara Jenayah kerana s. 180 itu menghendaki hakim bicara merekodkan pendapat atau penilaiannya terhadap keterangan pihak pendakwa sebelum memutuskan sama ada tertuduh dibebaskan atau dipanggil membela diri.

Mengenai persoalan pokok kedua di mana hakim bicara telah salah arah kerana memakai kedua-dua anggapan di bawah s. 37(d) dan (da) Akta tersebut memadailah saya merujuk kepada penghakiman Mahkamah Rayuan di mana saya sendiri adalah salah seorang daripada ahlinya yang ditulis oleh Abdul Hamid Mohamad HMR. Kes itu adalah *Chan Khen Nam lwn. PP* [2002] 1 CLJ 553. Dalam kes di hadapan saya sekarang Timbalan Pendakwa Raya bagi kes ini Puan Nurulhuda Nuraini mengakui benar bahawa hakim bicara telah memakai kedua-dua anggapan di bawah s. 37(d) dan (da) untuk membuktikan pengedaran dadah, tersebut namun begitu beliau berhujah bahawa s. 60 Akta Mahkamah Kehakiman 1964 terpakai kerana terdapatnya cukup keterangan bahawa perayu di sini memiliki dadah tersebut. Timbalan Pendakwa Raya yang bijaksana itu telah mengutarakan dua kes iaitu *Muhammad Hassan v. PP* [1998] 2 CLJ 170, dan *Tunde Apatira & Ors. v. PP* [2001] 1 CLJ 381 untuk menyokong hujahnya. Untuk menjawab hujah Puan Nurulhuda tersebut saya menerimapakai apa yang disebut oleh Abdul Hamid Mohamed HMR dalam kes *Chan Kheng Nam*. Di situ Abdul Hamid Mohamed HMR telah menyebut pada ms 556-57, "Kami telah mengambil perhatian keadaan dalam kes *Tunde Apatira* di mana Mahkamah Persekutuan memakai proviso berkenaan. Dalam kes itu dadah berkenaan dijumpai dalam peket dalam perut tertuduh. Kami juga mengambil perhatian keadaan dalam kes *Muhamad bin Hassan* dan *Haryadi bin Dadeh v. Public Prosecutor* [2000] 3 CLJ 553 (MP) di mana Mahkamah Persekutuan enggan memakai proviso tersebut. Dalam kes kita ini dadah berkenaan dijumpai dalam jeket di badan tertuduh, dalam poket sebelah kanan,

satu bungkusan akhbar yang mengandungi daun-daun kering disyaki ganja semasa di tempat kejadian. Dan semasa dalam pejabat Mohd. Fauzi bin Man (SP2), SP2 telah memeriksa kedua jeket di badan tertuduh dan menjumpai tiga bungkusan lagi. Dengan keterangan di atas itu hakim bicara telah menyatakan beliau berpuashati bahawa keempat-empat bungkusan itu berada di bawah jagaan atau kuasa tertuduh dan kerananya andaian di bawah s. 37(a) DDA 1952 terpakai. Seterusnya hakim bicara telah menyatakan memandangkan berat cannabis yang dirampas melebihi 200 gram andaian di bawah s. 37(da) Akta yang sama juga terpakai. Saya berpendapat tanpa keputusan mengenai milikan dadah yang dijumpai dalam kedua-dua jeket di badan tertuduh, anggapan di bawah s. 37(da) tidak boleh timbul. Hakim bicara hendaklah membuat penemuan mengenai milikan secara positif. Ini tidak berlaku dalam kes ini. Atas alasan ini saya enggan memakai proviso tersebut.

Dengan kedua-dua alasan di atas saya membenarkan rayuan ini, dan mensabitkan tertuduh di bawah s. 6 Akta tersebut dan dihukum di bawah s. 39A(2) Akta yang sama, dan menjatuhkan hukuman penjara selama 18 tahun daripada tarikh tangkap dan sepuluh kali sebatan.